Supreme Court, U.S.
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No. 97-1418

In the Supreme Court of the United States

OCTOBER TERM, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Successor by merger to Bank of America Illinois,
PETITIONER

v.

203 NORTH LASALLE STREET PARTNERSHIP,
RESPONDENT

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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This Court has already considered and rejected respondent's argument that "equitable mootness" was a reason to deny certiorari. Furthermore, three levels of the federal judiciary have considered the "equitable mootness" argument on the merits and have unanimously rejected it. See Pet. App. 10a-11a (Seventh Circuit), 60a (district court); 12/5/95 Tr. 14-18 (bankruptcy court). Those courts were bound by the one and only precedent respondent cites in its motion to dismiss,[1] yet they thought the precedent obviously distinguishable from this case. Indeed, the author of that precedent — Judge Easterbrook — voted to grant *petitioner's* suggestion of rehearing en banc, which respondent opposed on the ground that the case is equitably moot. See Pet. App. 49a.

The thrice-rejected "equitable mootness" argument not only was mentioned in respondent's unsuccessful brief in opposition, but was the principal argument in that brief. See Br. in Opp. 9-15; see also Reply Br. 4-8. There is no reason to think that the Court missed the issue. Nor does respondent's contention have any more merit now than it did two and a half weeks ago when the Court granted certiorari, or two and a half years ago when the bankruptcy court became the first of several courts to reject it.[2] For all of the reasons given in petitioner's reply brief, the "equitable mootness" argument provides no reason to deny certiorari, and especially provides no reason to dismiss the writ as improvidently granted.

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[1] *In re UNR Industries, Inc.*, 20 F.3d 766, 771 (7th Cir. 1994).

[2] Respondent relies most heavily for its mootness argument on the fact that the order confirming the plan of reorganization was *unstayed*. Yet that order was unstayed *precisely because* the bankruptcy court determined that the case would not become moot — equitably or otherwise — if that court denied a stay. See Reply Br. 5-6 (citing 12/4/95 and 12/5/95 Trs.). The "justifiable reliance" that respondent emphasizes (Mtn. to Dismiss 1) is a phrase more aptly applied to petitioner's reliance on the holdings of the courts below that the bankruptcy court's failure to enter a stay would not preclude full appellate litigation of the merits.

It bears repeating that respondent does *not* and could not contend that this case is moot in the Article III sense. Rather, respondent argues, in essence, that it is unfair to reverse an unstayed order confirming a plan of reorganization. But respondent and others have long been on notice of petitioner's intent to seek appellate review of the confirmation order. There is nothing unfair about allowing petitioner to obtain judicial review on the merits, nor is there any reason for this Court to avoid resolution of the eminently certworthy issue in this case because of respondent's often-repeated and often-rejected claims of unfairness.

The motion to dismiss should be denied.

Respectfully submitted.

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